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1 RECORD OF ORAL HEARING
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3 UNITED STATES PATENT AND TRADEMARK OFFICE
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6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
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10 *Ex parte* ANNE FARBROT and INGRID GUSTAFSSON
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13 Appeal 2008-4799
14 Application 10/800,176
15 Technology Center 3700
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18 Oral Hearing Held: February 11, 2009
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21 Before ERIC GRIMES, RICHARD M. LEOVITZ and
22 FRANCISCO C. PRATS, *Administrative Patent Judges*,
23

24 ON BEHALF OF THE APPELLANTS:
25

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32 The above-entitled matter came on for hearing on Wednesday,
33 February 11, 2009, commencing at 2:58 p.m., at the U.S. Patent &
34 Trademark Office, 600 Dulany Street, Alexandria, Virginia, before
35 Christine L. Loeser, Notary Public.

PROCEEDINGS

JUDGE GRIMES: Good afternoon. You have 20 minutes and you can start whenever you are ready.

MR. BOONE: Just as a broad overview for this application, this rejection, is that the Examiners relied on two components that have a very similar name, but they have very different physical structures, very different functions, and then it is asserted to modify one for the other.

Essentially, as a bullet point for this, is a similar name does not beget obviousness. Jumping to sort of the details of this is we have a primary reference which is Roe. That's a diaper with a lotioned top sheet. The lotion has two key ingredients, an emollient and an immobilizing agent.

Roe is very clear in expressing that both the emollient and the immobilizing are key ingredients. Column 10, lines 33 to 36, Roe expresses the emollients, a key active ingredient in the lotion, and that the purpose of the emollient is essentially to soften, soothe, supple, coat, lubricate, so forth, the skin.

The function of that emollient, of course, is, as I said, is to soothe the skin, and it transfers to the skin.

As an example of an emollient, Roe gives a polysiloxane. What the polysiloxane in Roe is is a linear chain, and it has a composition or structure that is basically going to make it function essentially as an oil or cream. With this oil or cream, it's going to transfer to the skin.

The Examiner said, you have that emollient and I'm going to substitute it with a different emollient. It looks to the reference Lin. Lin does teach a polysiloxane, but it's a very, very different substance.

1 It's an elastomeric cross-linked polysiloxane gel. It's something that is
2 going to essentially stay intact on the surface of the article it is applied to. It
3 is not going to transfer to the skin, and it does not have, in that regard, a
4 soothing effect or moisturizing effect on the skin.

5 I believe the Examiner has admitted to it, and if nothing else, it's on
6 page 7 in the Examiner's Answer and discussed in detail in my Reply Brief,
7 that I think there is agreement with the function of the polysiloxane gel.

8 So the combination or the modification the Examiner is making is
9 they are taking the emollient from Roe and substituting the polysiloxane gel
10 of Lin.

11 Roe has been very clear in expressing that this emollient is a very key
12 ingredient. I assert that you can't take away a key ingredient and replace it
13 with an ingredient that functions differently. It just doesn't make sense.

14 One skilled in the art wouldn't take this emollient, this polysiloxane
15 from Roe that is an oil or cream and is transferring to the skin to soothe it
16 and substitute it with a different polysiloxane that doesn't do any of those
17 features.

18 JUDGE PRATS: That is the idea that is expressed -- I'm looking at
19 column 13 of Lin at the bottom there -- where they give a whole bunch of
20 different uses for the gel.

21 For example, you can improve the properties of skin creams, skin care
22 lotions, et cetera, moisturizers and so forth. Would you care to comment on
23 that?

24 MR. BOONE: Sure. Those are talking about, when you use the
25 polysiloxane here -- it's in Lin -- it's a carrier that is releasing something else
26 or it is a part of another moisturizer.

1 So the polysiloxane itself in Lin is not the moisturizer. It is something
2 that will either be a part of a moisturizer or will release another active
3 substance.

4 JUDGE PRATS: Right. But there's a lotion on the top sheet of the
5 Roe diapers, correct?

6 MR. BOONE: Correct. I guess what you are doing here is you are
7 taking -- you would take this entire lotion of Lin, let's say, and Lin has this
8 lotion that is universally applied. It is not going to work on an absorbent
9 article.

10 Lin is never using it on an absorbent article. These lotions are, as they
11 are with a polysiloxane gel, as they are described in Lin, are going to block
12 absorbency. They essentially get in the way of the article from functioning
13 as it's claimed, which is -- it's claimed as an absorbent article.

14 The Examiner has made a couple of other points I would like to
15 address, essentially saying -- the Examiner points out that the Lin
16 polysiloxane gel is transferring an active ingredient. Lin is very explicit in
17 saying that that active ingredient is not an oil.

18 You can turn to column 2, line 17 to 20 of Lin, and again at column 7,
19 lines 14 to 17, and in those sections, Lin is very explicit. I am just reading
20 directly from it. Thus the active ingredient is not the oil and the oil is not the
21 active ingredient.

22 So with the modification that is being proposed, you are never putting
23 something that is going to transfer the soothing oil on to Roe.

24 And then something else that the Examiner has overlooked with this
25 combination --

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1 JUDGE LEBOVITZ: Just to go back to that point, the reason why
2 Lin -- is that Lin or Roe we were talking about?

3 MR. BOONE: Lin is the polysiloxane gel. What we were talking
4 about, yeah.

5 JUDGE LEBOVITZ: The oil phrase.

6 MR. BOONE: Yeah.

7 JUDGE LEBOVITZ: The reason why he is saying it is not the active
8 ingredient is he is trying to just distinguish it between other active
9 ingredients that are described, because when you look at what he talks about
10 as an oil, the oil can be leaf oil, jasmine, perfumes.

11 So clearly, it can have an activity. He is just saying it's not the active
12 ingredient such as the antimicrobial agents that are disclosed in that.

13 MR. BOONE: Right. But essentially, the Examiner, it seemed to
14 me, was using that as a hook to draw it in where I don't think that hook was
15 proper.

16 JUDGE GRIMES: I'd like to go back to something I think you said
17 earlier as well. I think you said if you put the lotion that Lin talked about,
18 you used the lotion of Lin as the emollient in Roe, that it would block the
19 absorbency of the diaper?

20 MR. BOONE: Yes.

21 JUDGE GRIMES: But Roe says that emollients useful in the present
22 invention can be petroleum based, including mineral oil and petrolatum, also
23 known as mineral wax, petroleum jelly, mineral jelly. Wouldn't those have
24 the same effects?

25 MR. BOONE: When you are getting to the polysiloxane gel itself,
26 that's something that doesn't transfer.

1 I think when you have the other sort of -- other petroleum base, a lot
2 of those, they are just applied very lightly to the top surface. Roe discusses
3 that, the top sheet of the diaper.

4 The way they are applied, they are made to transfer up. As soon as
5 you put it essentially on the skin, it transfers across and you don't get this
6 blockage, whereas the polysiloxane gel is made to not transfer.

7 JUDGE GRIMES: All right.

8 MR. BOONE: Again, the Examiner's combination, I guess, is
9 replacing the composition of Roe, the lotion which is an emollient and an
10 immobilizing agent, taking away that emollient and replacing it with the
11 polysiloxane gel of Lin.

12 So now you have the polysiloxane gel of Lin and an immobilizing
13 agent. And that combination is also something that one skilled in the art is
14 not going to do.

15 You sort of have two things that are immobilizing. There's no need to
16 do that and you run the risk of sort of the immobilizing agent and the
17 polysiloxane gel at the same time, creating too much of a barrier and not
18 allowing any active agent to be released or other issues related to that.

19 It really seems the Examiner is focused on this, the fact that they are
20 both polysiloxanes and that they should be, because the names are similar,
21 substitutable, and they just aren't. The emollients and the polysiloxane in
22 Roe does a different function than the polysiloxane of Lin. You can't
23 substitute a key ingredient with something that does something different.

24 I'll be happy to answer further questions.

25 JUDGE GRIMES: I don't think we have more questions. Thank you
26 for coming in.

1 MR. BOONE: Thank you.

2 (Whereupon, the proceedings at 3:09 p.m. were concluded.)